UPREME COURT, U. S.

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IN THE

Supreme Court of The United States

October Term, 1968

No. 1091

LOCAL 342, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), VAN E. WARREN, MARK BROCKETTE, GAIL M. TRIBBLE, LEWIS C. STONE, SHIRLEY L. JUDKINS, DELBERT STORIE, AND PERRY CARLTON,
Petitioners,

v.

TRW, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a labor arbitrator adds terms to a negotiated contract based on his own personal beliefs as to "fairness" and bases his award on the added terms, does a court act improperly in denying enforcement to the arbitrator's award?

STATEMENT OF THE CASE

Facts

On July 8, 1964, a two-day wildcat strike commenced at the Respondent Company's plant in Lebanon, Tennessee.[1] All seven of the individual petitioners in the instant case took part in the strike. At 10:15 a.m. on the second day of the strike, the Company sent each of the seven individual petitioners the following notice of discharge by telegram:

> "Because of your participation in an action in violation of Section I, Article 10 of the Company-Union Agreement dated February 15, 1963, you are discharged."

A copy of this same telegram was furnished petitioner Union. Striking employees began returning to work one hour and fifteen minutes after the notices of discharges were sent. (3a)[2]

A collective bargaining agreement was in effect between the Company and the Union at the time of the above events. Article X, Section 1 of the agreement provides in relevant part:

> "During the term of this Agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike * * *. The parties recognize the right of the Company to take disciplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants * * *. (6a)

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[1] More than 200 employees were involved in the strike. A substantial number of employees, however, stayed on their jobs and did not participate in the strike. (3a)

[2] Unless otherwise indicated, all page references herein are to the Appendix to the Petition for a Writ of Certiorari.

Article IV of the agreement contains a grievance procedure culminating in arbitration. The arbitration provision provides in relevant part:

> "* * * The Arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto. * * * The Arbitrator shall be bound by the provisions of this Agreement. * * *" (5a)

The Union processed grievances over the discharges of the seven striking employees through the grievance procedure and to arbitration. (2a)

The Award of The Arbitrator
(1a-16a)

The arbitrator found that each of the seven grievants (individual petitioners in this case) participated in a strike in violation of Article X, Section 1 of the agreement, and that each was informed by telegram that he was being discharged for such participation. (3a) The arbitrator further found that under Article X, Section 1 of the agreement, the Company had the right to impose selective discipline, including discharge, upon employees who were guilty of "participating" in a violation of that section, and that the disciplinary action taken by the Company need not be imposed upon all employees who were equally guilty of participating in a violation of the section. (10a-11a)

In spite of his findings that the seven grievants had participated in a strike in violation of the agreement and that the Company had the right to impose discipline, including discharge, because of such participation, the arbitrator held that the Company was only entitled to discharge those employees who had "actively encouraged other employees to participate in the strike." (13a) The arbitrator found that two of the grievants[3] were not guilty of actively encourag-

[3] Van E. Warren and Mark Brockette.

ing other employees to strike, and, in spite of their admitted participation in the strike, ordered the Company to reinstate them with back pay. (14a, 1a)

The arbitrator found that the remaining five grievants[4] were guilty of actively encouraging other employees to participate in the strike, and that they were "deserving of discipline." (13a) In spite of this finding, however, the arbitrator ordered the five grievants reinstated in their jobs based solely on the arbitrator's personal and subjective belief that "the procedure followed by the Company was lacking in fundamental fairness." (15a) The "procedural unfairness," according to the arbitrator, consisted of the Company's failure to inform the grievants of the charges against them, and the lack of objective investigation by the Company. (15a-16a)

When the Company refused to comply with the arbitrator's award, the Union and the individual grievants filed the instant action for enforcement of the award in the United States District Court for the Middle District of Tennessee.

The Decision of The District Court

(17a-25a)

The District Court held that the requirements of "active encouragement of others to strike" and "procedural unfairness" invoked by the arbitrator did not appear explicitly in the collective bargaining agreement. (21a) The court, nevertheless, upheld the arbitrator's award concluding that these two requirements were "a fair and logical inference from the agreement." (22a)

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[4] Gail M. Tribble, Lewis C. Stone, Shirley L. Judkins, Delbert Storie, Perry Carlton.

The Decision of The Court of Appeals (26a-35a)

The Court of Appeals for the Sixth Circuit denied enforcement of the arbitrator's award on the authority of *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

The court held that the conduct of the arbitrator "constituted the addition of terms to a negotiated contracts . . ." (31a) There was no requirement in the contract limiting the Company's right to discharge participants in a strike to those participants who actively encouraged others to strike. (32a) Neither was there a requirement in the contract of prior notice or bilateral investigation. (31a-32a) The court found that the arbitrator added those requirements to the contract based "upon his assumption that it was within his province to determine whether the company's exercise of its own contractual rights comported with his own notion of 'fundamental fairness.'" (29a) The court noted that the contract expressly provided:

> "The arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto." (32a)

The court stated its conclusion in the following language:

> "*Enterprise* announces the rule controlling this case.
>
> 'Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' 363 U.S. at 597.

Obeying that rule, we decide that the order of the arbitrator should have been denied enforcement." (35a)

ARGUMENT

I. Where a labor arbitrator adds terms to a negotiated contract based on his own personal beliefs as to "fairness" and bases his award on the added terms, this Court's decision in Enterprise requires that enforcement of the arbitrator's award be denied.

The controlling authority for this case is the decision of this Court in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). In *Enterprise* this Court reversed a court of appeals that had denied enforcement of an arbitrator's award because it did not agree with the arbitrator's interpretation of the collective bargaining agreement. This Court said:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his." 363 U.S. at 599.

This Court also stated in *Enterprise:*

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597.

Thus, two basic points were established by this Court in *Enterprise*. First, the question of interpretation of an agreement is for the arbitrator, and a court may not deny enforcement of his award because the court's interpretation of the agreement is different than his. Second—and equally important—this Court held that an arbitrator is *confined* to interpretation of the agreement. If the arbitrator does not confine himself to interpretation of the agreement, but instead proceeds "to dispense his own brand of industrial justice," then a court is obligated to deny enforcement of the award.

The proper application of the *Enterprise* test requires judicial examination of the arbitrator's award and judicial examination of the collective bargaining agreement. A determination as to whether the arbitrator has confined himself to interpretation of the agreement cannot be accomplished with less.

The court below in the instant case examined both the arbitrator's award and the collective bargaining agreement, as required by *Enterprise*. On the basis of its examination, the court below found that the arbitrator's award demonstrated that the arbitrator had not confined himself to interpretation of the agreement, but instead had added terms to the agreement based on his own personal beliefs as to fairness. Since an arbitrator is not permitted "to dispense his own brand of industrial justice," the court below —in compliance with *Enterprise*—denied enforcement of the arbitrator's award.

The court below found that the arbitrator had added terms to the agreement in two respects.

A. The "active encouragement of others to strike" addition.

Article X, Section 1 of the agreement provides in relevant part:

> "During the term of this Agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike * * *. The parties recognize the right of the Company to take disciplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants * * *. (6a)

The arbitrator found that each of the seven grievants participated in a strike in violation of this section and that each was informed he was being discharged for such participation. (3a) The arbitrator further found that under this section the Company had the right to impose selective discipline, including discharge, upon employees who were guilty of participating in a violation of the section and that the disciplinary action taken by the Company need not be imposed upon all employees who were equally guilty. (10a-11a) In spite of these findings, the arbitrator ruled that the Company was only entitled to discharge those employees who had "actively encouraged others to participate in the strike." (13a)[5] By so ruling, the arbitrator exceeded his contractual authority. The standard by which the arbitrator measured the Company's right to discharge the grievants was whether or not the grievants had actively encouraged others to strike. The standard set forth in the collective bargaining agreement, however, is *participation* in the prohibited strike. By basing his award on a non-contractual standard, the arbitrator was making an addition to the terms of the agreement which he was prohibited from doing not only by *Enterprise* but by the express terms of the agreement. Article IV of the agreement provides:

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[5] The arbitrator found that two of the grievants were not guilty of actively encouraging others to strike and ordered their reinstatement with back pay. (14a, 1a)

> "The Arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto."

The court below held that the "active encouragement of others to strike" requirement imposed by the arbitrator was non-contractual and constituted the addition of a term to the collective bargaining agreement. The court below stated:

> "It was [the arbitrator's] view that, notwithstanding that all seven appellees had engaged in the illegal strike, giving the company the right to discharge them, the company had a burden of proving to him that each of the grievants was in fact a leader in encouraging the illegal walkout.
>
> • • •
>
> The conduct which brought into being the company's right to discharge any employee was 'participation in an action in violation of Section 1, Article 10, of the company-union agreement.' All seven appellees were admittedly guilty of such a violation and were thereby subject to discharge without reference to whether they were or were not activists in promoting or encouraging others to join in an illegal strike. It was not for an arbitrator to add to the contract a provision that the above right to discharge would be lost unless the company had, in the turmoil and crisis of a strike, announced the reasons for the selectivity employed in exercising its rights and later had established that such reasons were, in the view of an arbitrator, sufficient to permit it to exercise the selectivity which was also an unqualified contractual right." (29a, 32a)

B. The "procedural unfairness" addition.

Although finding that five of the grievants were guilty of actively encouraging others to strike, the arbitrator ordered them reinstated based solely on his personal beliefs as to "procedural unfairness." As stated by the arbitrator:

> "The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to discharge an employee without informing him of the charges against him and without affording some opportunity for objective investigation." (15a-16a)

Thus, the "procedural unfairness," according to the arbitrator, consisted of the Company's failure to inform the grievants of the charges against them, and the lack of objective investigation by the Company.

The court below held—and properly—that the arbitrator's use of the "procedural unfairness" requirement "constituted the addition of terms to a negotiated contract." (31a) The court below found that the agreement did not contain any requirement of prior notice[6] or objective investigation. (31a-32a) The court below found that the award was based upon the arbitrator's "assumption that it was within his province to determine whether the company's exercise of its own contractual rights comported with his own notion of 'fundamental fairness.' " (29a)

Petitioner argues that the arbitrator's standard of "procedural unfairness" is the result of his interpretation of the five-step grievance procedure provisions of the agreement. (Petition, p. 5.) This is an example of wishful brief writing. Petitioner may wish that the arbitrator had so reasoned, but he did not. Nowhere does the arbitrator state that the five-step grievance procedure contains—or is interpreted by him to contain—the requirement of prior notice or objective investigation.

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[6] As noted by the court below, even if prior notice were a contractual requirement, the undisputed evidence as found by the arbitrator shows that each of the grievant's was in fact told of the charge against him and the reason for his discharge. (32a)

What the arbitrator does state is that:

> "The Arbitrator *believes* that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case." (Emphasis added.) (15a)

The arbitrator does not even purport to base the imposition of his "procedural unfairness" requirement on anything other than his own personal and subjective beliefs.

An arbitrator is not permitted "to dispense his own brand of industrial justice" based on his own personal beliefs. He is confined to interpretation of the particular collective bargaining agreement negotiated by the parties. That agreement contains no requirements of prior notice or objective investigation.

There is an even more basic reason, however, why Petitioner's argument must fail. At the outset of his opinion, the arbitrator makes the following statement:

> "*It was stipulated* that the entire case was properly before the Arbitrator for decision in accordance with the terms of the Collective Agreement and *that all preliminary procedures had been carried out as specified in the Collective Agreement.*" (Emphasis added. (2a)

The issue as to procedural fairness or unfairness was not submitted to the arbitrator for his determination. This issue was specifically excluded from the arbitrator's consideration by stipulation of the parties. It was stipulated that "*all* preliminary procedures had been carried out as specified in the Collective Agreement." (Emphasis added.) Thus, the "procedural unfairness" requirement imposed by the arbitrator could not properly have been an interpretation of the contractual procedures contained in the agreement because all issues as to these procedures were excluded from the arbitrator's consideration.

Further support—if any is needed—for this point is demonstrated by the fact that in quoting the relevant con-

tract provisions to be interpreted by him, the arbitrator omitted the five-step grievance procedure. (5a) This omission represents acknowledgment by the arbitrator that the procedures preliminary to arbitration were not before him for consideration or interpretation.

Contrary to Petitioner's assertion in its Petition to this Court, the court below did not substitute its interpretation of the agreement for the arbitrator's, in violation of *Enterprise*. The court below examined the arbitrator's award and the collective bargaining agreement—as required by *Enterprise*—and found that the arbitrator had not confined himself to interpretation of the agreement, but instead had added terms to the agreement based on his own personal beliefs as to fairness. By adopting two non-contractual standards—active encouragement of others to strike and prescribed procedures for discharge—as his criteria for deciding the grievances, the arbitrator manifested an infidelity to his obligation to confine himself to interpretation of the agreement. The arbitrator violated the test set by this Court, for he was dispensing "his own brand of industrial justice." The court below, in compliance with *Enterprise*, properly denied enforcement to his award.

The courts of appeals for the Second Circuit and the Fourth Circuit have applied the same rationale as the court below in holding that where an arbitrator does not confine himself to interpretation of the agreement but instead adds terms to the agreement, *Enterprise* requires that enforcement be denied of the arbitrator's award. *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F.2d 677, 681-82 (2d Cir. 1966); *Textile Workers Union of America v. American Thread Co.*, 291 F.2d 894, 900 (4th Cir. 1961); *International Union of Electrical Workers Local 791 v. Magnavox Co.*, 286 F.2d 465, 467 (6th Cir. 1961).

In its Petition, Petitioner asserts that the courts of appeals for the Seventh Circuit and the Eighth Circuit have

rejected the adding-terms-to-the-agreement test employed by the Second, Fourth and Sixth Circuits, citing as authority for this assertion *Western Iowa Pork Co. v. Packinghouse Workers Local 52,* 366 F.2d 275, 278 (8th Cir. 1966) and *Oil, Chemical & Atomic Workers Local 7-644 v. Mobil Oil Co.,* 350 F.2d 708, 711 (7th Cir. 1965). (Petition, p. 19.)

Neither of these cases supports the proposition asserted by Petitioner. In both cases the company contended that the arbitrator's award added terms to the agreement and that enforcement should be denied. The court in both cases rejected the company's contention, finding instead that the arbitrator had confined himself to interpretation of the agreement. The company's added-terms contention was rejected not because it was an incorrect statement of the law, but because a comparison of the award with the agreement demonstrated that the arbitrator had not, in fact, added terms to the agreement. An analysis of the two cases shows that the Seventh Circuit and the Eighth Circuit considered the added-terms test to be a proper ground for denying enforcement of an arbitrator's award, even though ultimately finding under the particular facts of each case that the record did not support the company's contention that the arbitrator added terms to the agreement.

II. The decision of the court below is not in conflict with the Third Circuit's decision in Ludwig Honold Mfg. Co.

Petitioner requests that this Court grant *certiorari* based on its assertion that the decision of the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123 (3d Cir. 1969). (Petition, pp. 13-15.) There is no conflict between the two decisions.

In *Honold,* the arbitrator was faced with two conflicting clauses in the agreement. One clause provided that perma-

nent job vacancies were to be posted for bidding and that employees with the greatest seniority would be assigned to fill such jobs. Another clause provided that employees newly assigned to a job would not be eligible for another job for six months. A contest for a new job developed between two employees, each of whom had been assigned to his present job within the preceding six months. The company assigned the job to the employee who had less seniority. The arbitrator upset the company's assignment and awarded the job to the employee with the greater seniority. The arbitrator reasoned that where the only applicants for the job were technically ineligible under the six-month clause, the promotion should be governed by the clause giving priority to the employee with the greatest seniority. The Third Circuit held that the arbitrator's award was based on his interpretation of express provisions contained in the agreement, and that in light of *Enterprise,* judicial interference with his award was not proper.

The decision of the Third Circuit in *Honold* and the decision of the court below in the instant case are not in conflict. Both courts relied on and applied the *Enterprise* test: If the arbitrator confines himself to interpretation and application of the collective bargaining agreement, his award will be enforced; if, on the other hand, the arbitrator does not confine himself to interpretation of the agreement but instead dispenses his own brand of industrial justice, his award will be denied enforcement. The Third Circuit in *Honold* found that the arbitrator had confined himself to interpretation of the agreement. The court below found that the arbitrator in the instant case had not. Both courts applied the same legal principle but a different result was reached by each because of different facts. This does not create a conflict between the two circuits.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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